Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

KENNETH W. LEE,

Petitioner,

vs.

ROBERT C. HUGHES, JR., and
DANIEL C. LANFORD, JR.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTION PRESENTED

1. Whether United States Probation Officers, as excepted service employees of the Judicial Branch, may bring *Bivens* actions for unconstitutional discrimination in their employment?

(The United States Court of Appeals for the Eleventh Circuit, in the case at bar, answered this Question in the negative, while the United States Court of Appeals for the Eighth Circuit has answered this Question in the affirmative.)

LIST OF ALL PARTIES IN COURT BELOW

Kenneth W. Lee

Robert C. Hughes, Jr.

Daniel C. Lanford, Jr.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Kenneth W. Lee ("Mr. Lee"), respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered in this case on July 9, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated July 9, 1998, is reported at 145 F.3d 1272, 1998 W.L. 380522 (11th Cir. 1998), and is reproduced in Appendix A to this Petition beginning on page 1a. The opinion of the United States District Court for the Middle District of Georgia vacating its prior order of dismissal and correcting typographical errors and substituting a new order of dismissal, filed January 29, 1997, is unreported and is reproduced in Appendix B to this petition, beginning at page 14a. The opinion of the district court filed April 2, 1997 denying the motion to alter, amend, vacate and set aside amended judgment is unreported and is reproduced in Appendix C to this petition, beginning at page 26a.

JURISDICTION

The judgment in the United States Court of Appeals for the Eleventh Circuit was entered on July 9, 1998. Pet. App. 1a. The jurisdiction of this Court is timely invoked

in 90 days thereof, pursuant to 28 U.S.C. §1254(1) (1988) and SUP. CT. R. 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case – the Fifth Amendment to the United States Constitution, §717(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16(a)(1988), the Civil Service Reform Act of 1978, 5 U.S.C. §2302 (1988), and §§102, 201 and 505 of the Congressional Accountability Act of 1995, Pub.L. 104-1, 109 Stat. 3 *et seq.* – are set forth in Appendix D beginning at page 31a.

STATEMENT OF THE CASE

This is a *Bivens* action brought by a discharged United States Probation Officer against his chief and deputy chief probation officers, alleging race discrimination in the conditions and termination of his employment in the Middle District of Georgia, under authority of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and *Davis v. Passman*, 442 U.S. 228 (1979).

Mr. Lee was hired in 1983 as a United States Probation Officer for the Middle District of Georgia. Pet. App. 2a, 16a. His veteran's status made him a preference eligible employee. Pet. App. 27a. As an employee of the U.S. Probation Service, he was an excepted service employee of the Judicial Branch. Pet. App. 18a, 27a.

Mr. Lee served as U.S. Probation Officer until his employment was terminated in 1996. At the time of Petitioner's termination, Respondent Daniel C. Lanford, Jr., was Chief U.S. Probation Officer for the Middle District of Georgia and Respondent Robert C. Hughes, Jr., was Deputy Chief U.S. Probation Officer. Pet. App. 2a, 16a. Petitioner Lee protested his termination and other conditions of his employment, on the grounds that they were improperly motivated by race. Pet. App. 2a, 16a.

Mr. Lee was provided an administrative remedy under the Model EEO Plan which was adopted by the Middle District of Georgia. Pet. App. 2a. A magistrate judge was appointed as investigator under the Plan, and he subsequently recommended approval of Petitioner's termination. Pet. App. 3a. The Chief Judge of the District accepted the report and approved the termination. The EEO Plan does not provide for a hearing upon request of the Plaintiff and none was held. Pet. App. 3a-4a.

Petitioner Lee then filed suit in district court against his supervisors, alleging unconstitutional race discrimination.[1] Pet. App. 4a. The district court dismissed the *Bivens* claim, holding that the Civil Service Reform Act of 1978 ("CSRA") preempted the field and was a special factor counseling hesitation in inferring a *Bivens* claim. Pet. App. 20a, 22a, 28a. The Eleventh Circuit Court of Appeals affirmed: "We hold that the CSRA precludes a

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[1] Petitioner's unsuccessful §1981 claim is foreclosed by the 1991 Civil Rights Amendments that, in subsection (c), expressly limited the §1981 remedy to unlawful state and private race discrimination. 42 U.S.C. §1981(c); Pet. App. 11a, 35a. Therefore, Petitioner does not seek review on this point.

Bivens remedy in this case notwithstanding the fact that the CSRA does not provide administrative or judicial review of the adverse action." Pet. App. 7a. The Court of Appeals noted: "We recognize that this case is troubling because Plaintiff was not afforded a Congressionally enacted judicial or administrative procedure through which to vindicate the alleged constitutional wrong." Pet. App. 9a.

REASONS FOR GRANTING THE WRIT

I. IT IS NECESSARY TO RESOLVE THE SPLIT IN THE CIRCUITS ON WHETHER UNITED STATES PROBATION OFFICERS, AS EXCEPTED SERVICE EMPLOYEES OF THE JUDICIAL BRANCH, MAY PURSUE *BIVENS* REMEDIES FOR UNCONSTITUTIONAL DISCRIMINATION IN THEIR EMPLOYMENT.

The Eighth Circuit Court of Appeals has held that a United States Probation Officer, because of this Court's holding in *Davis v. Passman*, 442 U.S. 228 (1979), may pursue a *Bivens* claim as an excepted service employee of the Judicial Branch, for unconstitutional discrimination in his employment. *Duffy v. Wolle*, 123 F.3d 1026, 1033-1035 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1839 (1998). The Eighth Circuit found that implying a *Bivens* right of action in Probation Officer Duffy's case was quite straight-forward, given this Court's holding in *Davis v. Passman, supra*, allowing a Fifth Amendment claim for unconstitutional gender discrimination. 123 F.3d at 1033-34. The Eighth Circuit further held that the district

court EEO plan was not a special factor counselling hesitation. 123 F.3d, at 1034-35.

Likewise, the leading commentators also have opined that excepted service employees of the Federal Judiciary may bring *Bivens* claims for unconstitutional race or gender discrimination in their employment. 2 B. Lindemann & D. Grossman, EMPLOYMENT DISCRIMINATION LAW, p. 1565, "Employees of the Judicial Branch" (3rd ed. 1996).

In contrast, the Eleventh Circuit held in the case at bar that the Civil Service Reform Act of 1978 ("CSRA") was a special factor counselling hesitation. Pet. App. 7a, 11a. The Eleventh Circuit gave short shrift to *Davis v. Passman, supra,* Pet. App. 7a-8a, focusing on the enactment of CSRA, even though the Court of Appeals: "recognize[d] that this case is troubling because Plaintiff was not afforded a Congressionally enacted judicial or administrative procedure through which to vindicate the alleged constitutional wrong." Pet. App. 9a.[2] The Eleventh Circuit thereby overlooked this Court's detailed discussion of *Davis v. Passman,* involving an excepted service employee in the Legislative Branch, in this Court's opinion in *Bush v. Lucas,* 462 U.S. 367, 376-378 (1983), involving a competitive service employee of the Executive Branch. In holding that the statutory remedial scheme for

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[2] None of the cases deemed similar by the Eleventh Circuit (listed at Pet. App. 9a-10a) involved race or gender discrimination claims, but all did involve Executive Branch employees plainly encompassed by CSRA. Only *Duffy v. Wolle, supra,* involved (i) a discrimination claim, and/or (ii) an excepted service employee of a Judicial Branch agency.

Mr. Bush and similarly situated employees was the special factor counselling hesitation, the *Bush* Court nonetheless expressly distinguished the situation under CSRA of those for whom no statutory remedy at all was provided. *Compare Bush v. Lucas*, 462 U.S., at 378 & n. 14, *with id.*, 462 U.S., at 390-391 (Marshall, J., concurring).

II. THE ELEVENTH CIRCUIT HAS RULED CONTRARY TO THIS COURT'S BINDING PRECEDENT IN *DAVIS V. PASSMAN*.

This Court in *Davis v. Passman, supra,* prior to *Bush v. Lucas, supra,* had stated:

> Third, there is in this case "no *explicit* congressional declaration that persons" in petitioner's position injured by unconstitutional federal employment discrimination "may not recover money damages from" those responsible for the injury. *Bivens, supra,* 403 U.S. at 397. (Emphasis supplied).

Davis v. Passman, 422 U.S., at 246-247 (emphasis by court).

The *Davis* Court then noted that there was:

> an explicit congressional prohibition against judicial remedies for those in petitioner's position. When §717 was added to Title VII to protect federal employees from discrimination, it failed to extend this protection to congressional employees such as petitioner who are not in the competitive service.(fn 26) *See* 42 USC §2000(e)-16(a). There is no evidence, however, that Congress meant §717 to foreclose alternative remedies available to those not covered by the statute. Such silence is far from the "clearly

> discernable will of Congress" perceived by the Court of Appeals. . . . In a similar manner, we do not now interpret §717 to foreclose the judicial remedies of those expressly unprotected by the statute. On the contrary, §717 leaves undisturbed whatever remedies petitioner might otherwise possess.
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> Fn 26 [in opinion]: Since petitioner was not in the competitive service, *see* n. 2, *supra*, the remedial provisions of §717 of Title VII are not available to her. In *Brown v. GSA*, 425 U.S. 820 (1976), we held that the remedies provided by §717 are exclusive when those federal employees covered by the statute seek to redress the violation of rights guaranteed by the statute.

Davis v. Passman, 442 U.S., at 247 & n. 26.

The *Davis* Court then stated that if Congress:

> were . . . to create equally effective alternative remedies, the need for damages relief might be obviated.

Davis, 442 U.S., at 248.

However, there is no other statutory remedy for race discrimination available to Mr. Lee or any of the almost twenty thousand probation officers, pretrial services officers, deputy clerks and other support staff in the Federal Judiciary.[3] *Compare Bush v. Lucas*, 462 U.S., at 378 & n. 14, *with id.*, 462 U.S., at 390-391 (Marshall, J., concurring).

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[3] For data, *see* 1995 Year End Report by Chief Justice William H. Rehnquist On the Federal Judiciary, Part IV, www.uscourts.gov/ttb/jan96ttb/1yearend.html.

This complete absence of a statutory remedy for discrimination is why the *Bush* Court acknowledged the continuing vitality of *Davis v. Passman*. *Bush*, 462 U.S., at 376-378.

III. THE TWO STATUTORY SCHEMES IMPACT A LARGE SEGMENT OF JUDICIAL EMPLOYEES: DID CONGRESS LEGISLATIVELY OVERRULE *DAVIS V. PASSMAN*?

Title VII expressly provided an anti-discrimination remedy to most federal employees other than excepted service employees of the Legislative and Judicial Branches of the Federal Government. This provision in Section 717(a) of the Civil Rights Act of 1964, as amended, was enacted in 1972, when federal employees in the competitive service of all three branches of the government and the excepted service of the Executive Branch of government[4] were expressly granted coverage and protection against discrimination on the basis of race, sex, national origin, and religion. 42 U.S.C. §2000e-16(a). That the Court found this determinative in *Davis v. Passman, supra*, was reiterated in *Bush v. Lucas*, 462 U.S., at 376-378. CSRA changed none of this, as it continued the express lack of coverage over discrimination claims for persons like Petitioner in 5 U.S.C. §2302(a)(1), (b)(1)(A) by incorporating Section 717(a) *in toto* in the definition of

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[4] The Eleventh Circuit perhaps went astray by viewing CSRA as creating the competitive service and excepted service as new categories, Pet. App. 4a-5a; instead, CSRA merely codified extant categories. *See, e.g.*, 42 U.S.C. §2000e-16(a) [enacted in 1972], Pet. App. 31a-32a; *Davis v. Passman, supra* (involving excepted service employee).

"prohibited personnel practice." Pet. App. 31a-32a, 34a. *See also* Congressional Accountability Act, Pub.L. 104-1, 109 STAT. 3 *et seq.*, §§102(a)(2), 201(c)(2), 505; Pet. App. 33a-34a.[5] Accordingly, CSRA did not preempt Title VII's remedial scheme; it adopted it.

Congress knows how to legislatively overrule this Court's decisions. Congress left the "hole" in Section 717(a) that the *Davis* Court found dispositive in Ms. Davis' *Bivens* action. This precise statutory subsection left excepted service employees in the Legislative Branch and Judicial Branch agencies without a statutory remedy for race, or gender, discrimination. 42 U.S.C. §2000e-16(a) (1988). In the Congressional Accountability Act of 1995, *supra*, at §§102 & 201, Pet. App. 32a-33a, Congress did finally extend Title VII statutory remedies to Legislative Branch employees. Yet, the Congress clearly left Judicial Branch excepted service employees without any statutory remedy for race discrimination, and expressly inquired of the Judicial Conference of the United States what to do about the situation. *See* Congressional Accountability Act, *supra*, at §505, Pet. App. 33a-34a. Hence, *Davis v. Passman* has not been legislatively overruled, as Congress has not amended either §717(a) of Title VII or 5 U.S.C. §2302 of

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[5] Sections 102(a)(2) and 201(c)(1) of the Congressional Accountability Act of 1995 finally extended Title VII of the Civil Rights Act of 1964 and certain other labor and employment law statutes to all Congressional employees, amending §717(a) of the Civil Rights Act of 1964 so that only Judicial Branch excepted service employees, such as Petitioner, are still excluded from coverage. Pub. L. 104-1, 109 STAT. 3 *et seq.* Pet. App. 32a-33a.

CSRA to provide any statutory remedy for race, or gender, discrimination to Petitioner and other Judicial Branch excepted service employees.

The Eighth Circuit and the commentators are correct that *Davis v. Passman*, 442 U.S. 228 (1979), is still good law and is binding precedent in the case of excepted service employees of the Judicial Branch. *Compare Duffy v. Wolle, supra, with* 2 B. Lindemann & D. Grossman, EMPLOYMENT DISCRIMINATION LAW, p. 1565, "Employees of the Judicial Branch" (3rd ed. 1996).

Finally, the issue before this Court impacts the several thousand excepted service employees of the agencies within the Judicial Branch of the Federal Government. Undersigned counsel of record has inquired of one of the sponsors of the Congressional Accountability Act of 1995 and has been advised by his office that the Judicial Conference of the United States having responded to Congress under §505 of the Congressional Accountability Act of 1995, Pub. L. 104-1, 109 STAT. 3 *et seq.*, Pet. App. 33a-34a, by stating that Title VII need not be extended to Judicial Branch employees. Hence, the issue in this case remains statutorily unresolved and likely will not be legislatively resolved any time soon.

CONCLUSION

The Eleventh Circuit's decision erroneously leads to an inconsistency in the judicial relief afforded to race discrimination claims. The inconsistency flowing from the Court of Appeals' result is that Federal Government

employers in the Executive Branch agencies and (since 1995) in Legislative Branch agencies are judged in open court on race discrimination claims; state and local government employers are judged in open court on race discrimination claims; and private sector employers are judged in open court on race discrimination claims. Yet, Federal employers in Judicial Branch agencies would be relieved from answering in open court on claims of unconstitutional race discrimination in public employment. This is indeed inconsistent with *Davis v. Passman* and is inconsistent with the constitutional magnitude of race relations in our Nation's history.

The Petition should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8423

D.C. Docket No. 5:96-CV-316-3

KENNETH W. LEE,

Plaintiff-Appellant,

versus

ROBERT C. HUGHES, JR.;
DANIEL C. LANFORD, JR.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(July 9, 1998)

Before CARNES, Circuit Judge, KRAVITCH, Senior Circuit Judge, and MILLS*, Senior District Judge.

KRAVITCH, Senior Circuit Judge:

In this case, we must decide whether a federal employee who is not afforded an administrative or judicial remedy under the Civil Service Reform Act of 1978 (codified and amended in various sections of 5 U.S.C.)

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* Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois, sitting by designation.

("CSRA" or "the Act") can bring a federal claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971), in order to recover monetary damages for alleged constitutional violations, and whether § 1981 provides a cause of action against individuals acting under color of federal law. We answer both questions in the negative.

I.

Kenneth W. Lee ("Lee" or "plaintiff") was hired as a U.S. Probation Officer for the Middle District of Georgia in 1983 and served in that capacity until his employment was terminated in 1996. At the time of Lee's termination, Daniel Lanford ("Lanford") was the Chief U.S. Probation Officer for the district, and Robert Hughes ("Hughes") was the Deputy Chief U.S. Probation Officer. Lee protested his termination on the ground that it was improperly motivated by race and sought redress through the Equal Employment Opportunity ("EEO") Plan for the Middle District of Georgia.[1]

A complainant seeking to initiate an action under the EEO Plan must file a timely discrimination complaint with the EEO Coordinator, who then makes the necessary investigation, consults with the parties, and prepares a report "identifying the issues, describing his or her findings and recommendations, explaining what resolution, if any, was achieved, and defining what corrective actions,

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[1] The EEO Plan adopted by the Middle District of Georgia is identical to the EEO plan that had been considered and approved by the Judicial Conference of the United States.

if any, will be undertaken."[2] If the complainant objects to the rejection or cancellation of the complaint, he may request that the Chief Judge of the district review the matter. The Chief Judge then must:

a. Conduct any additional investigation which he or she deems necessary;

b. Determine whether to interview the parties or other persons;

c. Determine whether to hold a formal hearing on the matter; and

d. Issue a final decision on the rejection, cancellation, or merits of the complaint if it is found that no interviews or hearings are necessary.[3]

A magistrate judge was appointed to investigate Lee's allegations and subsequently recommended approval of Lee's termination. The Chief Judge of the

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[2] EEO Plan at 2.

[3] EEO Plan at 3. The EEO Plan does not provide for a hearing upon request of the complainant, and the record does not suggest that plaintiff here requested a formal hearing subsequent to the Chief Judge's final decision in this case. In fact, it appears that plaintiff's attorney, in a letter sent to the Chief Judge that stated objections to Lee's potential termination, only *suggested* that a formal hearing would be appropriate at some future date. *See* Letter of March 14, 1996 ("I will be present at your court this afternoon and if some resolution cannot be had prior to the informal hearing scheduled for 1:30 p.m., then I would move the court to continue said matter to a date after the responses have been filed by the parties with the Probation Department, against whom the complaints will have been made. At that time, a formal hearing would be appropriate.").

district accepted the report and approved the termination. Lee then filed suit in district court against his supervisors in their individual capacities asserting a *Bivens* claim for alleged racial discrimination and alleging a violation of § 1981.

The district court dismissed the *Bivens* claim for lack of subject matter jurisdiction. Specifically, the court held that the CSRA is the exclusive vehicle through which federal employees can challenge or remedy adverse personnel decisions, even under circumstances in which the CSRA does not provide for administrative or judicial review of the personnel decision at issue. In the alternative, the district court dismissed both claims for failure to state a claim upon which relief could be granted. Lee appeals the dismissal of both claims.

II.

Lee contends that the district court erred in dismissing his *Bivens* claim, because he otherwise will not be afforded a judicial remedy for the alleged discrimination. Defendants, on the other hand, argue that Congress intended for the CSRA to be the exclusive vehicle through which federal employees can challenge adverse personnel decisions and that, as such, the CSRA precludes plaintiff's *Bivens* claim for damages. We review *de novo* the district court's decision to dismiss plaintiff's *Bivens* claim. *See McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996).

The CSRA "comprehensively overhauled the civil service system," *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 773, 105 S. Ct. 1620, 1624 (1985), and created

an elaborate "new framework for evaluating adverse personnel actions against [federal employees]," *id.* at 774, 103 S. Ct. at 1624. The CSRA details the protections and remedies available to federal employees in such actions, including the availability of administrative and judicial review. *See United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668 (1988). The CSRA divides civil service employees into three main classifications, *see* 5 U.S.C. §§ 3132, 2102, 2103; *Fausto*, 484 U.S. at 441 n. 1, 108 S. Ct. at 670 n. 1, within which employees are further classified as preference-eligible or nonpreference-eligible, *see* 5 U.S.C. § 2108. Specific protections and remedies available under the CSRA are dependent upon the civil service employee's classification within the Act. *See, e.g.*, 5 U.S.C. § 7511; *see generally Fausto*, 484 U.S. at 445-49, 108 S. Ct. at 672-75 (discussing various chapters within the CSRA and the protections provided therein). The parties do not dispute that Lee is a preference-eligible member of the excepted service and, as such, did not have the right to file a petition with the Office of Special Counsel ("OSC") of the Merit Systems Protection Board ("MSPB"). Although the remedies provided in the EEO Plan were available to Lee, the CSRA did not provide him with judicial or administrative review of the adverse personnel action alleged.

In *Fausto*, the Supreme Court considered whether the CSRA precluded judicial review under the Tucker Act, 28 U.S.C. § 1491, for nonpreference-eligible members of the excepted service who, under the CSRA, were not afforded administrative or judicial review of suspension for misconduct. After examining the purpose of the CSRA, the

entirety of the text, and the structure of review established by the Act, the Court held that the "CSRA established a comprehensive system for reviewing personnel action taken against federal employees," *id.* at 454, 108 S. Ct. at 677, and that Congress deliberately excluded certain employees from the provision establishing administrative and judicial review for adverse personnel actions. Although the *Fausto* Court specifically was considering the remedies afforded under the CSRA in the context of nonpreference-eligible members of the excepted service, this court has held that "*Fausto* applies to preference-eligible as well as non-preference employees." *Stephens v. Dept. of Health and Human Servs.*, 901 F.2d 1571, 1575 (11th Cir.) (holding that CSRA precluded *Bivens* claim for damages for allegedly prohibited personnel practice where, under the CSRA, the OSC refused to petition MSPB with plaintiff's complaint), *cert. denied*, 498 U.S. 998 (1990). Most notably, this court has recognized *Fausto* as "emphatically and conclusively establish[ing] the preemptive nature of the CSRA." *Id.*

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396, 91 S. Ct. 1999, 2005 (1971), the Supreme Court held that a plaintiff could state a cause of action and recover money damages against a federal official for constitutional violations occurring under the color of federal law. "A *Bivens* action is only permitted where 1) the petitioner has no alternative means of obtaining redress, and 2) there are no 'special factors counseling hesitation.' " *Stephens*, 901 F.2d at 1577 (citing *Bivens*, 403 U.S. at 396-97, 91 S. Ct. at 2005). The Supreme Court has limited the circumstances under which a *Bivens* claim may be asserted and has held:

> When the design of a Government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of the program's administration[, we have not created additional Bivens remedies].

Schweiker v. Chilicky, 487 U.S. 412, 423, 108 S. Ct. 2460, 2468 (1988).

Although this circuit has "recognized that the comprehensive statutory scheme established by Congress relating to federal employment (CSRA) precludes the maintenance of job-related *Bivens* actions by federal employees," *Stephens*, 901 F.2d at 1577, this case presents the court with a novel issue: whether a federal employee for whom the CSRA provides *no* administrative or judicial review for adverse personnel actions can assert a *Bivens* claim for monetary damages against individual defendants who allegedly have violated the complainant's constitutional rights. We hold that the CSRA precludes a *Bivens* remedy in this case notwithstanding the fact that the CSRA does not provide administrative or judicial review of the adverse personnel action.

Lee relies almost exclusively on *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264 (1979), in support of his argument that he should be afforded a *Bivens* remedy here. His reliance is misplaced. In *Davis*, the federal-employee plaintiff, who was not protected by Title VII, brought a *Bivens* action for workplace discrimination. The Supreme Court held that a *Bivens* action was permissible because there was "no evidence . . . that Congress meant § 717 [of Title VII] to foreclose alternative remedies available to those not covered by the statute." *Davis*, 442 U.S. at 247,

99 S. Ct. at 2278. The Court noted that "[f]or Davis, as for Bivens, 'it is damages or nothing.' " *Id.* at 245, 99 S. Ct. at 2277. As an initial matter, the *Davis* Court did not consider the effect of the CSRA on Davis's *Bivens* claim because the CSRA had been enacted immediately prior to the ruling and the preemptive effect of the Act was not an issue before the Court. Furthermore, more recent Supreme Court cases do not reflect the *Davis* Court's willingness to recognize a *Bivens* claim in instances where there is a clear congressional intent to exclude certain classes of employees from a statute's comprehensive remedial scheme, as is the case with the CSRA. For example, in *Bush v. Lucas*, 462 U.S. 367, 388, 103 S. Ct. 2404, 2416 (1983), the court stated:

> Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

Accord United States v. Fausto, 484 U.S. 439, 108 S. Ct. 668 (1998).

We recognize that this case is troubling because plaintiff was not afforded a congressionally enacted judicial or administrative procedure through which to vindicate the alleged constitutional wrong. Since the creation of the *Bivens* cause of action, however, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts," *Schweiker v. Chilicky*, 487 U.S. 412, 421, 108 S. Ct. 2460, 2467 (1988), and specifically has held that the exclusion of certain classes of employees from the remedies provided by the CSRA reflects not congressional silence from which courts may imply that an excluded employee is "free to pursue whatever judicial remedies he would have had before enactment of the CSRA," *Fausto*, 484 U.S. at 447, 108 S. Ct. at 673 (considering CSRA's effect on the Tucker Act), but rather congressional intent to *deny* the excluded employee specific protections otherwise afforded by the Act, *see id.* In light of Congress's deliberate exclusion of certain employees from the protections of the CSRA and this country's long-respected separation of powers doctrine, courts should be hesitant to provide an aggrieved plaintiff with a remedy where Congress intentionally has withheld one.

Although "[n]o Supreme Court opinion holds squarely that the CSRA always prevents federal employees from bringing Bivens actions to right job-related wrongs," *Saul v. United States*, 928 F.2d 829, 836 (9th Cir. 1991), at least three courts of appeals have held that "the CSRA precludes even those *Bivens* claims for which the act prescribes no alternative remedy," *Saul*, 928 F.2d at 840. *See id.* (holding that "the CSRA is a special

factor counseling against recognition of a *Bivens* remedy"); *Lombardi v. Small Business Admin.*, 889 F.2d 959, 961 (10th Cir. 1989) ("The recent Supreme Court cases of *Fausto* . . . and in particular the most recent *Chilicky* case . . . indicate that the Court will not create a Bivens remedy in a Federal employment action even if no remedy at all has been provided by the CSRA."); *Volk v. Hobson*, 866 F.2d 1398, 1403-04 (Fed. Cir.) ("Whether or not an employee has access to all of the procedures and remedies of the CSRA . . . , it illustrates the logic inherent in the Supreme Court's admonitions to leave the federal personnel system to Congress[, which is in a] far better position to set the policy and adjust the system than judges confronting ad hoc situations and trying to fill perceived gaps in the program by allowing employees to prosecute Bivens suits against each other."), *cert. denied*, 490 U.S. 1092 (1989); *see also Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (holding that the CSRA does not prevent award of injunctive relief, but implying that the Act is a special factor militating "against the creation of a new nonstatutory damages remedy"). No circuit has held to the contrary.[4]

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[4] We recognize that the Eighth Circuit recently held that a local EEO Plan is not a special factor counseling hesitation and therefore allowed plaintiff's *Bivens* claim to proceed. *See Duffy v. Wolle*, 123 F.3d 1026, 1033 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1839 (1998). It appears that the defendants in *Duffy* never suggested that the CSRA preempted plaintiff's claim, but rather argued only that plaintiff's *Bivens* claim should have been dismissed because the local EEO Plan provided plaintiff with a remedy. Because the Eighth Circuit did not address the CSRA's effect on Duffy's *Bivens* claim, *Duffy* is not instructive here.

We agree with the Ninth Circuit's conclusion that "[t]he CSRA's comprehensive remedial provisions convince us that there was no inadvertence by Congress in omitting a damages remedy against supervisors whose work-related actions allegedly violate a subordinate's constitutional rights," *Saul*, 928 F.2d at 840, and accordingly hold that the CSRA is a special factor counseling against recognition of a *Bivens* suit here. In light of the comprehensive nature of the CSRA and the Supreme Court's conclusion that the exclusion of certain employees from judicial review of adverse personnel decisions reflects "manifestation of a considered congressional judgment," *Saul*, 928 F.2d at 840, plaintiff is precluded from asserting a *Bivens* claim in an attempt to recover damages for the constitutional violations alleged here.

III.

Lee contends, without citing supporting authority, that the district court also erred in holding that "§ 1981 does not support a cause of action for claims of employment discrimination arising under color of *federal* law." We review *de novo* the district court decision to dismiss the claim. *See McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996). Because we agree with the district court's conclusion that Lee's allegations of discrimination cannot support a claim under § 1981, we affirm the dismissal of that claim.

Both circuit precedent and the text of § 1981 compel us to hold that a plaintiff cannot maintain a § 1981 claim against a federal defendant acting under color of federal

law. Prior to the Civil Rights Act of 1991, this court had held that a "suit against the federal defendant acting solely under color of *federal law* could not have been brought pursuant to any of the statutes enumerated in [42 U.S.C.] § 1988." *Martin v. Heckler*, 773 F.2d 1145, 1152 (11th Cir. 1985) (emphasis in original). Section 1981 is one of the statutes enumerated in § 1988. *See* 42 U.S.C. § 1988(b). Through the Civil Rights Act of 1991, Congress amended § 1981 and added subsection (c), which provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law." 42 U.S.C. § 1981(c). Accordingly, the language of § 1981 is clear: Section 1981 provides a cause of action for individuals subjected to discrimination by private actors and discrimination under color of state law, but does not provide a cause of action for discrimination under color of federal law.[5] Because we find no basis for Lee's

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[5] We are unaware of any court that has held otherwise. *Cf. Espinueva v. Garrett*, 895 F.2d 1164, 1165 (7th Cir.) ("Section 1981 does not apply to employment discrimination cases involving the federal government. . . . "), *cert. denied*, 497 U.S. 1005 (1990); *Williams v. Glickman*, 936 F.Supp. 1, 4 (D.D.C. 1996) ("Weighing the inconclusive legislative history and the statute's general statement of purpose against plain, unambiguous statutory language, the Court must apply the plain language of the statute and dismiss plaintiffs' § 1981 claim because the plaintiffs do not allege impairment of rights by nongovernmental discrimination or impairment under color of state law."); *Carlton v. Ryan*, 916 F. Supp. 832, 838 (N.D.Ill. 1996) (stating that "§ 1981 does not apply to the federal government"); *La Compania Ocho, Inc. v. U.S. Forest Serv.*, 874 F.Supp. 1242, 1250-51 (D.N.M. 1995) (noting that "section 717 of Title VII constitutes the exclusive remedy for federal government discrimination in the *employment* context,"

argument that § 1981 should afford him relief, we affirm the district court's dismissal of that claim.

IV.

Accordingly, we AFFIRM the district court's order dismissing Lee's claims for damages under *Bivens* and 42 U.S.C. § 1981.[6]

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but holding that § 1981 applies against the federal government for *non-employment* racial discrimination).

[6] We note that the district court was incorrect to conclude that it lacked subject matter jurisdiction, but was correct to dismiss for failure to state a claim. *See Bell v. Hood*, 327 U.S. 678, 682-83, 66 S. Ct. 773, 776 (1946). We therefore affirm the district court's judgment. *See Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992) ("[T]his court may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KENNETH W. LEE, Plaintiff,	CIVIL ACTION NO. 5:96-CV-316-3
v.	Civil Order File Vol. 66, P. 6664
ROBERT C. HUGHES, JR. and DANIEL C. LANFORD, JR., Defendants.	

ORDER

(Filed Jan. 29, 1997)

The Court hereby **VACATES** its Order dated January 16, 1997 and enters the attached Order in its place. The Court enters this new Order to correct typographical errors and to make minor stylistic modifications in its earlier Order. Also, the Court inadvertently omitted the word "not" on page 8, line 6 of the earlier Order. The final sentence of the first paragraph of page 8 should read as follows: "Therefore, the Court's construing the language of § 1981 above as not covering claims against federal actors would *not* constitute a repeal by implication in this Circuit." The attached Order cures the omission in the earlier Order.

It is **SO ORDERED**, this 24th day of January, 1997.

/s/ Frank M. Hull
FRANK M. HULL
UNITED STATES DISTRICT JUDGE*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KENNETH W. LEE, Plaintiff,	) CIVIL ACTION NO. 5:96-CV-316-3
v.	)
ROBERT C. HUGHES, JR. and DANIEL C. LANFORD, JR., Defendants.	)

ORDER

Plaintiff Kenneth W. Lee brings this employment discrimination action against Defendants Robert C. Hughes, Jr. and Daniel C. Lanford, Jr. under § 1981 and the United States Supreme Court's opinion in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). This matter is before the Court on Defendants' Motion to Dismiss [9-1].

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* The Honorable Frank M. Hull, United States District Court Judge for the Northern District of Georgia, is sitting by designation.

I. FACTS

In 1983, Plaintiff was hired as a United States Probation Officer for the Middle District of Georgia. Plaintiff served in this capacity until his employment was terminated in 1996. During the entirety of Plaintiff's tenure, Defendant Lanford was the Chief U.S. Probation Officer for the Middle District of Georgia and Defendant Hughes was the Deputy Chief U.S. Probation Officer for the District.

Plaintiff protested his termination, as well as poor performance evaluations and a demotion which preceded Plaintiff's termination, on the ground that they were improperly motivated by Plaintiff's race. Accordingly, the Chief Judge appointed United States Magistrate Judge Richard Hodge to investigate Plaintiff's allegation. Magistrate Judge Hodge recommended approval of the termination of Plaintiff's employment. Chief Judge Duross Fitzpatrick, relying on Magistrate Judge Hodge's report and recommendation, approved Plaintiff's termination. Plaintiff was notified of Chief Judge Fitzpatrick's decision by letter dated May 20, 1996.

On August 16, 1996, Plaintiff brought this action alleging that Defendants violated his rights under the equal protection component of the Fifth Amendment to the United States Constitution and under § 1981. On October 15, 1996, Defendants filed their Motion to Dismiss.

II. DISCUSSION

A. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims

Defendants contend that the Court lacks subject matter jurisdiction over Plaintiff's claims because of the Civil Service Reform Act of 1978 ("CSRA"). Specifically, Defendants contend that Congress intended for the CSRA to be the exclusive vehicle through which federal employees could challenge or remedy adverse personnel decisions. In the circumstances where the CSRA does not permit administrative or judicial review of the adverse personnel decision, Defendants contend that federal district courts (and the Court of Claims) lack the subject matter jurisdiction to inquire into the merits of that adverse personnel decision. This Court agrees.

The United States Supreme Court noted in *United States v. Fausto*, 484 U.S. 439 (1988), that the CSRA "comprehensively overhauled the civil service system," *id.* at 443 (quoting *Lindahl v. OPM*, 470 U.S. 768, 773 (1985)), creating an elaborate "new framework for evaluating adverse personnel actions against [federal employees]." *Id.* (quoting *Lindahl*, 470 U.S. at 774). The Supreme Court emphasized that the CSRA "prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative or judicial review." *Id.* In *Fausto*, the Supreme Court acknowledged that "no provision of the CSRA gives nonpreference members of the excepted service[1] the right to administrative or judicial review of suspension for misconduct," *id.*,

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[1] The CSRA divides civil service employees into three main classifications: (1) senior executive service; (2) competitive

which was the adverse personnel decision in issue in that case. Thus, the Supreme Court framed the issue to be decided: "whether [Congress's] withholding of remedy was meant to preclude judicial review for those employees, or rather merely to leave them free to pursue the remedies that had been available before enactment of the CSRA." *Id.* at 443-44. In *Fausto,* the Supreme Court decided that the former was true. *Id.* at 447.

Similar to the plaintiff in *Fausto,* Plaintiff here is a nonpreference member of the excepted service. Thus, the question becomes whether the CSRA gives a nonpreference member of the excepted service the right to judicial review of an adverse personnel decision when that employee claims that the adverse personnel decision is constitutionally infirm or when the adverse personnel decision purportedly violates a statutory right of the employee. The Court answers this question in the negative, especially since Congress addressed the issue of discrimination against federal employees within the CSRA.

The CSRA forbids federal agencies from engaging in certain "prohibited employment practice," including unlawful discrimination. 5 U.S.C. § 2302(b)(1)(A). The remedy the CSRA established for this violation, however, is that the employee may file a petition with the Office of

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service; and (3) excepted service. The excepted service is further divided into two categories: (a) preference eligibles; and (b) nonpreference eligibles. Plaintiff here is a nonpreference member of the excepted service.

the Special Counsel ("OSC") of the Merit Systems Protection Board ("MSPB") challenging the prohibited employment practice. The OSC then investigates the charges and, where appropriate, seeks remedial action. *See* 5 U.S.C. § 1206; *Fausto*, 484 U.S. at 446; *Spagnola v. Mathis*, 859 F.2d 223, 225-26 (D.C. Cir. 1988). *The CSRA does not give non-preference members of the excepted service the right to seek judicial review of such adverse personnel decisions. Fausto*, 484 U.S. at 443; *Spagnola*, 859 F.2d at 225.

Plaintiff does not challenge any of the foregoing. Instead, Plaintiff argues only that the CSRA is irrelevant here because he is not seeking judicial review of an agency action, but rather is seeking relief against Defendants in their individual capacities. However, the question is not who is sued, and in what capacity. Rather, the question is whether Plaintiff's casting the adverse personnel decisions against him as constitutional in nature, and as violations of § 1981, is only an attempt to have the merits of the adverse personnel decisions against him reviewed by this Court. *See Royals v. Tisch*, 864 F.2d 1565, 1568-69 (11th Cir. 1989). This clearly is the case here as the very essence of Plaintiff's claims are that the adverse personnel decisions that were made *regarding his employment* were because of his race. Therefore, the CSRA applies and Plaintiff cannot avoid its preemptive effects, irrespective of who Plaintiff has filed claims against and in what capacity they are sued.

In sum, Congress enacted the CSRA to "replace the haphazard arrangements for administrative and judicial review of personnel action." *Faust*, 484 U.S. at 444. Considering this purpose, and the elaborate nature of the CSRA's scheme, the Supreme Court, the Eleventh Circuit,

and several other courts have held that the CSRA preempts all other remedies which may have been available to federal employees challenging adverse personnel decisions. *See Faust, supra* (precluding claim based on Back Pay Act); *Stephens v. Department of Health and Human Services*, 901 F.2d 1571, 1576-77 (11th Cir. 1990) (precluding APA claims and *Bivens* claim); *Royals*, 864 F.2d at 1568-69 (rejecting Plaintiff's attempt to recast his claims in constitutional language); *see also Ayrault v. Pena*, 60 F.3d 346, 348 (7th Cir. 1995); *LeBlanc v. United States*, 50 F.3d 1025, 1030 (Fed. Cir. 1995); *McAuliffe v. Rice*, 966 F.2d 979, 981 (5th Cir. 1992); *Jones v. Tennessee Valley Authority*, 948 F.2d 258, 264 (6th Cir. 1991) (precluding Bivens claim); *Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991) (precluding *Bivens* claim); *Lombardi v. Small Business Admin.*, 889 F.2d 959, 961 (10th Cir. 1989) (precluding *Bivens* claim); *Yokum v. United States*, 887 F.2d 276, 280-81 (4th Cir. 1989) (precluding *Bivens* claim); *McIntosh v. Turner*, 861 F.2d 524, 526-27 (8th Cir. 1988) (precluding *Bivens* claims against federal officers); *Diaz v. United States*, 853 F.2d 5, 9 (1st Cir. 1988).

Because the CSRA preempts all other remedies and does not give Plaintiff, a nonpreference member of the excepted service, a right to judicial review of any adverse personnel decision, this Court does not have subject matter jurisdiction over Plaintiff's claims against Defendants. Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's *Bivens* claims and Plaintiff's claims under § 1981.

B. Plaintiff's Complaint Fails To State A Claim Upon Which Relief Can Be Granted

Alternatively, Plaintiff's Complaint also fails to state claims upon which relief can be granted.

1. Plaintiff's Bivens Claim

Plaintiff alleges that Defendants violated his rights under the equal protection component of the Fifth Amendment. Generally, plaintiffs suffering constitutional injuries at the hands of federal officials may file *Bivens* actions to redress their injuries. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, the Supreme Court has held that a *Bivens* action will be defeated if Congress has provided an alternative remedy or if there are special factors counseling hesitation in the absence of clear action by Congress. *Id.* at 396-97; *see also Bush v. Lucas*, 462 U.S. 367, 377-78 (1983); *Carlson v. Green*, 446 U.S. 14, 18-19 (1980); *Davis v. Passman*, 442 U.S. 228, 245-47 (1979). The Supreme Court emphasized in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), that when Congress has provided what it considers adequate remedies that the Court has not created additional *Bivens* remedies, as follows:

> [W]hen the design of a Government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of [the program's] administration [we have not created additional *Bivens* remedies].

Id. at 423.

Congress has provided what it considers adequate remedies for the violations Plaintiff alleges – the CSRA. The Eleventh Circuit repeatedly has held that "the comprehensive statutory scheme established by Congress relating to federal employment (CSRA) precludes the maintenance of job related *Bivens* actions by federal employees." *Stephens*, 901 F.2d at 1577; *McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Wells v. FAA*, 755 F.2d 804, 810 (11th Cir. 1985); *see also Bush v. Lucas*, 462 U.S. 367, 388-90 (1983). Here, Plaintiff's claims undeniably are job related. Thus, the CSRA precludes the maintenance of Plaintiff's *Bivens* claims.

Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's *Bivens* claims against Defendants.

2. Plaintiff's § 1981 Claim

Likewise, Plaintiff's claims under § 1981 fail to state a claim because § 1981 does not support a cause of action for claims of employment discrimination arising under color of *federal* law. Congress amended § 1981 when it enacted the Civil Rights Act of 1991. Congress amended § 1981 to state that the rights protected by § 1981 are protected against impairment by nongovernmental discrimination and discrimination under color of state law, as follows:

> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental

> discrimination and impairment under color of State law.

42 U.S.C. § 1981(c). The statute, by its express terms, applies only in cases of discrimination by a private actor, or discrimination by a state actor. It does not apply in cases of discrimination by a federal actor. *See Williams v. Glickman*, 936 F. Supp. 1, 5 (D.D.C. 1996); *Gallardo v. Board of County Comm'rs*, 857 F. Supp. 783, 787 (D. Kan. 1994).

Plaintiff argues that construing the language of § 1981(c) in this manner is inappropriate because it would constitute what Plaintiff characterizes as a repeal by implication. Plaintiff bases his argument on the fact that prior to the Civil Rights Act of 1991, several authorities permitted § 1981 claims against federal actors. However, the Eleventh Circuit was not one of these authorities. While neither party has cited, and the Court has not discovered, any case where the Eleventh Circuit squarely has addressed the issue whether a plaintiff can maintain a § 1981 action against a federal actor, there are Fifth Circuit and Eleventh Circuit cases which strongly suggest that a plaintiff cannot.

For example, in *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985), the Eleventh Circuit stated that "[a] suit against the federal defendant acting solely under color of federal law could not have been brought pursuant to any of the statutes enumerated in section 1988." *Id.* at 1152. Section 1981 is one of the statutes enumerated in § 1988. Also, in *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980), the old Fifth Circuit stated that the court in that case did not

have jurisdiction under 28 U.S.C. § 1343, the jurisdictional section for § 1981 and § 1983, because any deprivation in the case was under color of federal law. *Id.* at 984 n.1. Thus, the pre-Civil Rights Act of 1991 case law of this circuit apparently did not permit plaintiffs to bring § 1981 claims against federal actors. Therefore, the Court's construing the language of § 1981 above as not covering claims against federal actors would not constitute a repeal by implication in this Circuit.

Moreover, to the extent Congress "repealed" *any* language residing in § 1981 prior to its amendment, Congress did not do so by implication. Rather, Congress clarified the prior language of § 1981 by explicitly adding new language stating that the rights protected by § 1981 are protected against impairment by nongovernmental discrimination and discrimination under color of state law.[2] In so doing, Congress did not repeal any language

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[2] In fact, Congress did not repeal any language in § 1981. Prior to the enactment of the Civil Rights Act of 1991, § 1981 provided, in its entirety, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988). When Congress amended § 1981 in 1991, it retained the above language and placed it in subsection (a) of the amended statute. Congress then added new language to § 1981, including the language noted above in § 1981(c). Thus,

of the prior § 1981 more so than it repealed prior judicial interpretations of § 1981. "The courts frequently find Congress to have done this." *Fausto*, 484 U.S. at 453.

For all of the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's claims under § 1981 against both Defendants.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss [9-1] and hereby dismisses Plaintiff's Complaint.

It is **SO ORDERED**, this 24th day of January, 1997.

/s/ Frank M. Hull
FRANK M. HULL
UNITED STATES DISTRICT JUDGE*

Congress did not repeal any thing in § 1981, by implication or otherwise. Congress merely added new language to the statute to clarify against whom claims can be brought.

* The Honorable Frank M. Hull, United States District Court Judge for the Northern District of Georgia, is sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KENNETH W. LEE, Plaintiff,	:	CIVIL ACTION NO. 5:96-CV-316-3
v.	:	
ROBERT C. HUGHES, JR. and DANIEL C. LANFORD, JR., Defendants.	:	

ORDER

(Filed Apr. 2, 1997)

This matter is before the Court on Plaintiff's Motion to Alter, Amend, Vacate, and Set Aside Amended Judgment [22-1]. The Court **DENIES** Plaintiff's Motion to Alter, Amend, Vacate, and Set Aside Amended Judgment for the reasons outlined below.

I. DISCUSSION

A. Civil Service Reform Act

In the Court's Order filed on January 29, 1997, the Court, as way of background, labeled Plaintiff as a nonpreference member of the excepted service. The Court then stated that as a nonpreference member of the excepted service, Plaintiff had a right to challenge his adverse employment action by filing a petition with the Office of Special Counsel ("OSC") of the Merit Systems Protection

Board. This was incorrect. Instead, Plaintiff was a preference eligible member of the excepted service in the judicial branch and did not have the right to file a petition with the OSC.

Because of the Court's misperception in this regard, Plaintiff contends that the Court's ruling that Plaintiff's *Bivens* claim was preempted by the Civil Service Reform Act ("CSRA") should be set aside. The Court disagrees.

The Court's mislabelling of Plaintiff's federal employee status was immaterial to its ruling. The operative fact for purposes of the Court's analysis was that the CSRA does not provide Plaintiff the right to administrative or judicial review of the merits of any adverse personnel decision. This fact, which Plaintiff does not contest, is the only fact that matters because it is the absence of any right to judicial review which deprives the Court of subject matter jurisdiction over Plaintiff's *Bivens* and § 1981 claims.[1]

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[1] In *United States v. Fausto*, 484 U.S. 439 (1988), the United States Supreme Court noted that the CSRA did not eliminate any statutory remedy the plaintiff in *Fausto* may have had under the Back Pay Act, 5 U.S.C. § 5596. *See Fausto*, 484 U.S. at 453. The Supreme Court noted that Congress knows how to repeal a statute and generally does not do so silently or by implication. However, the Supreme Court also noted that Congress *has* been known to have implicitly repealed a legal disposition or judicial interpretation of a statute. *Id.* Thus, while the Back Pay Act remains an operative part of the integrated statutory scheme Congress set up to protect civil servants, all other then existing remedies, with the possible exception of any other non-repealed express statutory remedy, are now preempted by the CSRA. Thus, Plaintiff's *Bivens* claim is preempted.

As for Plaintiff's § 1981 claim, the Court found that Plaintiff's Complaint did not state a claim under § 1981 because

After determining that Plaintiff has no right to judicial review under the CSRA, the primary focus of the Court's analysis centered on whether the CSRA in fact applies in this case and whether the CSRA's not granting a right to judicial review preempts Plaintiff's *Bivens* and § 1981 claims. The Court's determination that the CSRA does apply and that it does [sic] preempts Plaintiff's claims remains unaltered, as does the Court's rejection of Plaintiff's arguments to the contrary. Regardless of whether any remedy is available under the CSRA for an adverse personnel decision, that statute has "preempted the field by 'superseding preexisting remedies for all federal employees.' " *Ayrault v. Pena*, 60 F.3d 346, 348 (7th Cir. 1995); *see also Royals v. Tisch*, 864 F.2d 1565 (11th Cir. 1989).

Thus, while the Court mischaracterized Plaintiff's federal employee status, the primary focus of the Court's analysis remains unaltered and the result is the same. Accordingly, the Court finds that setting aside the judgment in this action is unwarranted.

B. Bivens

Also unaltered is the Court's determination that Plaintiff's *Bivens* claim fails because the CSRA constitutes a special factor counseling against creating a *Bivens* cause of action in the federal employment context. *Stephens v.*

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§ 1981 does not provide remedies for discrimination under color of *federal* law. However, to the extent that any pre-CSRA courts interpreted § 1981 to provide such a remedy, it also is now preempted by the CSRA because any such remedy is not expressly provided for in the statute.

Department of Health and Human Servs., 901 F.2d 1571, 1577 (11th Cir. 1990). Moreover, Congress amended the Back Pay Act, 5 U.S.C. § 5596, in 1990 specifically to provide employees of the judicial branch with a backpay remedy for "unjustified or unwarranted" personnel actions in appropriate circumstances. 5 U.S.C. § 5596(b)(1). Such a remedy is not precluded by the CSRA. *United States v. Fausto*, 484 U.S. 439, 453 (1988). This remedy provided by Congress also defeats Plaintiff's *Bivens* claim.[2]

For the foregoing reasons, the Court **DENIES** Plaintiff's Motion to Set Aside the Judgment.

II. CONCLUSION

The Court **VACATES** the portion of the Court's Order filed on January 29, 1997 mislabeling Plaintiff's federal employee status and stating that Plaintiff had a right to file a petition with the OSC. The Court **DENIES** Plaintiff's Motion to Alter, Amend, Vacate, and Set Aside the Amended Judgment [22-1].

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[2] Plaintiff does not move to set aside the Court's judgment with respect to Plaintiff's § 1981 claim.

It is **SO ORDERED**, this 1st day of April, 1997.

/s/ Frank M. Hull
FRANK M. HULL
UNITED STATES DISTRICT JUDGE*

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* The Honorable Frank M. Hull, United States District Court Judge for the Northern District of Georgia, is sitting by designation.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Statutes:

Title VII of Civil Rights Act, as amended:

Section 717 (a), as added by Equal Employment Opportunity Amendments of 1972, Pub.L. 92-261, 42 U.S.C. §2000e(16)(a):

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in

the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Congressional Accountability Act of 1995, Pub.L. 104-1, 109 Stat. 3 *et. seq.*:

Section 102, APPLICATION OF LAWS.

(a) LAWS MADE APPLICABLE – The following laws shall apply, as prescribed by this Act, to the legislative branch of the Federal Government:

* * *

(2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et. seq.*)

* * *

Section 201. RIGHTS AND PROTECTIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, THE REHABILITATION ACT OF 1973, AND TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990.

* * *

(c)(1) Section 717 of the Civil Rights Act of 1964 – Section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16) is amended by –

(A) striking "legislative and";

(B) striking "branches" and inserting "branch"; and

(C) inserting "Governmental Printing Office, the General Accounting Office, and the" after "and in the".

* * *

Section 505. JUDICIAL BRANCH COVERAGE STUDY

The Judicial Conference of the United States shall prepare a report for submission by the Chief Justice of the United States for the Congress on the application to the judicial branch of the Federal Government of –

(1) the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et. seq.*);

(2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et. seq.*);

(3) the Americans With Disabilities Act of 1990 (42 U.S.C. 12101 *et. seq.*);

(4) the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et. seq.*);

(5) the Family and Medical Leave Act of 1993 (29 U.S.C. 2611 *et. seq.*);

(6) the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et. seq.*);

(7) Chapter 71 (relating to Federal service labor-management relations) of Title 5, United States Code;

(8) the Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 *et. seq.*);

(9) the Worker Adjustment & Restraining Notification Act (29 U.S.C. 2101 *et. seq.*);

(10) the Rehabilitation Act of 1973 (29 U.S.C. 701 *et. seq.*); and

(11) Chapter 43 (relating to veterans' employment & re-employment) of Title 38, United States Code.

The report shall be submitted to Congress not later than December 31, 1996, and shall include any recommendations the Judicial Conference may have for legislation to provide the employees of the judicial branch the rights, protections, and procedures under the listed laws, including administrative and judicial relief, that are comparable to those available to employees of the legislative branch under titles I thru IV of this Act.

The Civil Service Reform Act of 1978:

5 U.S.C. §2302

(a)(1) For purposes of this Title, "prohibited personnel practice" means any action described in subsection (b) of this section.

* * *

(b) Any authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –

(1) discriminate for or against any employee or applicant for employment –

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under Section 717 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16); . . .

Civil Rights Act of 1866; as amended by Pub.L. 102-166, Title I, §101, 105 Stat. 1071:

42 U.S.C. §1981(c)

> The rights protected by this section are protected against impairment by nongovernment discrimination and impairment under color of State law.

Supreme Court, U.S.
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(2)

No. 98-554

In the Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH W. LEE, PETITIONER

v.

ROBERT C. HUGHES, JR., AND DANIEL C. LANFORD, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether a preference-eligible employee in the excepted service of the Judicial Branch may bring an action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to recover monetary damages from his supervisors for termination of his employment.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 145 F.3d 1272. The opinions of the district court (Pet. App. 14a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1998. The petition for writ of certiorari was filed on October 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former United States Probation Officer for the Middle District of Georgia, brought a federal suit against his supervisors for damages on account of the termination of his employment, relying in part on this Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court dismissed petitioner's suit, holding that Congress's decision to provide limited remedies for federal employees under the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified at various sections of Title 5 of the United States Code), precludes the judiciary from creating a *Bivens* remedy. See Pet. App. 14a-30a. The court of appeals affirmed the district court's decision. *Id.* at 1a-13a.

1. Congress has authorized the United States District Courts to appoint and remove probation officers. See 18 U.S.C. 3602(a). In 1983, the United States District Court for the Middle District of Georgia appointed petitioner as a probation officer. Pet. App. 2a. Respondent Daniel Lanford, who was Chief U.S. Probation Officer, and respondent Robert Hughes, who was Deputy Chief U.S. Probation Officer, supervised petitioner. *Id.* at 2a, 16a. After petitioner received poor performance evaluations, the district court demoted petitioner and ultimately terminated his employment. *Id.* at 16a.

Petitioner protested his termination on the ground that the decision was improperly motivated by race, and he sought redress through the Equal Employment Opportunity (EEO) Plan for the Middle District of Georgia. Pet. App. 2a. The EEO Plan adopted by the Middle District of Georgia is identical to the EEO plan that had been considered and approved by the Judicial

Conference of the United States. *Id.* at 2a n.1. A complainant may initiate an action under the EEO Plan by filing a timely discrimination complaint with the EEO Coordinator. The EEO Coordinator or a court appointed investigator makes an investigation, consults with the parties, and prepares a report "identifying the issues, describing his or her findings and recommendations, explaining what resolution, if any, was achieved, and defining what corrective actions, if any, will be undertaken." *Id.* at 2a-3a. If the complainant objects to the report, the complainant may request the chief judge of the district court to review the matter. *Id.* at 3a. The chief judge may conduct any additional investigation deemed necessary, interview the parties or other persons, and determine whether to hold a formal hearing on the matter. *Ibid.*

The chief judge appointed a magistrate judge to investigate petitioner's discrimination claim. Pet. App. 16a. After completing his investigation, the magistrate judge submitted a report recommending that the chief judge reject petitioner's discrimination claim. *Ibid.* Petitioner's counsel, who was provided with a copy of the report, submitted written objections.[1] After considering the magistrate's report and recommendations and

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[1] Under the EEO Plan, an aggrieved employee may seek review of the report and the chief judge may hold a formal hearing, including the cross-examination of witnesses. See C.A. Supp. App. Doc. 2 (EEO Plan, § 7.04(D)(3)(c)). In this case, the chief judge met with petitioner's counsel and said he was "open to whatever appeal, whatever tact [*sic*] you wished to take." C.A. Supp. App. Docs. 5, 6. Petitioner's counsel did not request a formal hearing at that meeting and instead submitted a three-page letter to the chief judge objecting to the magistrate judge's report. C.A. Supp. App. Doc. 7.

petitioner's objections, the chief judge approved petitioner's termination. *Ibid.*

2. Petitioner filed suit in district court for compensatory and punitive damages against respondents in their individual capacities. Petitioner asserted a *Bivens* claim and a claim under 42 U.S.C. 1981, alleging that he was terminated on the basis of race. The district court granted respondents' motion to dismiss and entered judgment in their favor. The district court held, among other things, that the CSRA sets out the appropriate procedures and remedies for resolving federal employment disputes and that the CSRA precludes the courts from creating additional *Bivens* remedies for damages from the employee's supervisors. Pet. App. 17a-22a.[2]

Petitioner moved the district court to alter or amend its judgment, but the court entered an order denying that motion. Pet. App. 26a-30a. The court acknowledged that its prior opinion had incorrectly stated that petitioner was a "nonpreference member of the excepted service" and that petitioner had a right under the CSRA to challenge the adverse employment action by filing a petition with the Office of Special Counsel of the Merit Systems Protection Board. *Id.* at 26a-27a. Instead, petitioner was "a preference eligible member of the excepted service in the judicial branch and did not have the right to file a petition with the [Office of Special Counsel]." *Id.* at 27a. The court nevertheless rejected petitioner's contention that its misperception

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[2] The district court also concluded that petitioner's Section 1981 claimed was without merit because the statute does not apply to actions taken under color of federal law. Pet. App. 22a-25a. The court of appeals affirmed this ruling on appeal (*id.* at 11a-13a), and petitioner does not challenge that holding in his petition to this Court.

of petitioner's employment classification justified setting aside the court's ruling. *Id.* at 27a-29a.

The district court stated that "[t]he operative fact for purposes of the Court's analysis was that the CSRA does not provide [petitioner] the right to administrative or judicial review of the merits of any adverse personnel decision." Pet. App. 27a. The district court concluded that Congress's decision to provide federal employees with certain CSRA remedies, but to limit those statutory remedies in other respects, "constitutes a special factor counseling against creating a *Bivens* cause of action in the federal employment context." *Id.* at 28a. The district court additionally noted that:

> Congress amended the Back Pay Act, 5 U.S.C. § 5596, in 1990 specifically to provide employees of the judicial branch with a back pay remedy for "unjustified or unwarranted" personnel actions in appropriate circumstances. 5 U.S.C. § 5596(b)(1). Such a remedy is not precluded by the CSRA. *United States v. Fausto*, 484 U.S. 439, 453 (1988). This remedy provided by Congress also defeats [petitioner's] *Bivens* claim.

Id. at 29a.

3. The court of appeals affirmed the district court's judgment. Pet. App. 1a-13a. That court rejected petitioner's argument that he is entitled to a *Bivens* remedy. *Id.* at 4a-11a. The court reasoned that Congress had enacted the CSRA to provide a comprehensive remedial scheme for federal employees' employment-related claims and that the CSRA does not provide an administrative or judicial remedy to preference eligible employees of the excepted service who work in the Judicial Branch. *Id.* at 4a-5a. The court of appeals reasoned that Congress had made that decision deliber-

ately and that it would be inappropriate for the courts to create a *Bivens* remedy in the face of Congress's action. *Id.* at 4a-11a. "In light of Congress's deliberate exclusion of certain employees from the protections of the CSRA and this country's long-respected separation of powers doctrine, courts should be hesitant to provide an aggrieved plaintiff with a remedy where Congress intentionally has withheld one." *Id.* at 9a.

ARGUMENT

The petition for a writ of certiorari should be denied. The court of appeals' conclusion that the CSRA precludes the creation of a *Bivens* remedy here is correct and consistent with this Court's decisions. There is no conflict among the courts of appeals on that issue warranting the Court's review.

1. This Court decided in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that a plaintiff who alleged injury from violation of his Fourth Amendment rights could seek money damages against the responsible federal officers for the constitutional violation. The Court later extended that remedy to other types of constitutional injuries. See *Davis* v. *Passman*, 442 U.S. 228 (1979) (denial of due process); *Carlson* v. *Green*, 446 U.S. 14 (1980) (cruel and unusual punishment). The Court recognized that the judicial creation of a monetary remedy for constitutional violations was appropriate in those situations because Congress had not created a remedial mechanism to address the alleged constitutional violations and there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397. See *Davis*, 442 U.S. at 245-247; *Carlson*, 446 U.S. at 18-20.

This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). See *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). In those situations in which Congress has established a comprehensive statutory scheme to resolve disputes with the federal government, the Court has concluded that a *Bivens* remedy is inappropriate, even if the remedial scheme does not provide complete relief for the alleged constitutional injury. See *Schweiker*, 487 U.S. at 422-423; *Bush* v. *Lucas*, 462 U.S. 367, 388-390 (1983). The Court has explained that the "the concept of 'special factors counselling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Schweiker*, 487 U.S. at 423. See *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983). "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," this Court has held that it is inappropriate for a court to afford "additional *Bivens* remedies." *Schweiker*, 487 U.S. at 423.

As this Court has recognized, the CSRA "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), and created an elaborate "new framework for evaluating adverse personnel actions against [federal employees]," *id.* at 774. The CSRA classifies federal employees according to their responsibilities and qualifications. See *United States* v. *Fausto*, 484 U.S. 439, 441 n.1 (1988); 5 U.S.C. 2101-2105 (1994 & Supp. II 1996), 2108, 3132 (1994 & Supp. II 1996). It then specifies, for employees in each classification, the employment protections, remedies, and ave-

nues for administrative and judicial review of adverse personnel actions. See, *e.g.*, 5 U.S.C. 7501-7703 (1994 & Supp. II 1996).

In this case, petitioner, who is a preference-eligible member of the excepted service in the Judicial Branch, enjoys a number of employment benefits under the CSRA and related statutes, but he does not have the statutory rights provided to most other federal employees to challenge an adverse personnel action. The fact that Congress has not extended the same CSRA rights to petitioner and other judicial branch employees does not mean, however, that petitioner may assert a *Bivens* claim. Congress deliberately excluded court personnel from those provisions of the CSRA based on a policy judgment that took into account both the Judicial Branch's need for independence in personnel management and the court personnel's employment rights. Congress's judgment on that matter is a "special factor[] counselling hesitation" that weighs against creating a *Bivens* remedy. See *Schweiker*, 487 U.S. at 423, 426-429; *Bush*, 462 U.S. at 372-373 & n.9.

Congress has struck a carefully considered balance that is sensitive to the interests of the Judicial Branch. In the case of probation officers, Congress granted the district courts the authority to appoint and remove those employees, 18 U.S.C. 3602(a), and it established that a paid probation officer may be removed by the district court only "for cause." *Ibid.* The Judicial Conference has, in turn, directed that each district court adopt an EEO Plan that, among other things, provides a mechanism by which probation officers, as well as other court personnel, may seek redress of discrimination complaints. Pet. App. 2a-3a. Under the Back Pay Act of 1966, a court employee who successfully invokes that administrative remedy may be entitled to back pay

plus interest. See 5 U.S.C. 5595-5596 (1994 & Supp. II 1996).[3]

Congress's decision to limit the rights of court employees to challenge adverse personnel actions in this way was not "inadvertent." *Schweiker*, 487 U.S. at 423. Congress elected to provide probation officers and other court appointed personnel many benefits that are available to other federal employees, including severance pay, 5 U.S.C. 5595 (1994 & Supp. II 1996), retirement benefits, 5 U.S.C. 8331(1)(A), life insurance, 5 U.S.C. 8701(a)(1), health insurance, 5 U.S.C. 8901(1)(A), and coverage under the Annual and Sick Leave Act of 1951, 5 U.S.C. 6301(2), and the Family and Medical Leave Act of 1993, 5 U.S.C. 6381(1). Congress's decision, nevertheless, to provide more circumscribed rights to challenge adverse personnel actions reflects conscious sensitivity to the personnel management interests of the Judicial Branch, which in turn is a "special factor[] counselling hesitation." *Schweiker*, 487 U.S. at 423; *Bush*, 462 U.S. at 380, 388-390.

Congress's sensitivity to the Judicial Branch's employment interests is especially clear in light of its enactment of the Administrative Office of the United States Courts Personnel Act of 1990 (AO Act), Pub. L. No. 101-474, 104 Stat. 1097. The AO Act placed employees of the Administrative Office of the United States Courts outside of the coverage of the CSRA for purposes of adverse personnel actions and directed the Administrative Office to design its own administrative

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[3] The Back Pay Act of 1966 defines an "employee" as "an individual employed in or under an agency," and it defines an "agency" to include the federal courts. See 5 U.S.C. 5595(a)(1) and (2)(A), 5596(a); 28 U.S.C. 610; see also 5 U.S.C. 2104(a), 2105 (1994 & Supp. II 1996).

remedies. § 3(a), 104 Stat. 1097-1098. In doing so, Congress recognized that it was necessary for the Judicial Branch to have its own "independent, self-contained personnel management system." H.R. Rep. No. 770, 101st Cong., 2d Sess. Pt. 1, at 5 (1990). Petitioner is not an employee of the Administrative Office and therefore is not entitled to invoke the specific administrative remedies that the Administrative Office created through that Act. Nevertheless, Congress recognized that the federal courts were already "mostly free" of Executive Branch supervision over employment matters, and the administrative remedies that petitioner and other Judicial Branch employees are entitled to invoke through the court-adopted EEO Plans are analogous to the procedures envisioned under the AO Act. *Ibid.*

Congress described the AO Act as establishing a "comprehensive personnel system" for Administrative Office employees, H.R. Rep. No. 770, *supra*, at 1, and it stated that this personnel system is similar to that available to "the rest of the judicial branch," *id.* at 5. The mandated procedures, like the EEO Plans, provide a mechanism for resolving employment disputes involving claims of discrimination. See § 3(a)(5) and (9), 104 Stat. 1097-1098; H.R. Rep. No. 770, *supra*, at 5, 7-8. In both situations, Congress has enabled the employee to seek a back pay remedy, under the Back Pay Act of 1966, in conjunction with the administrative review scheme. H.R. Rep. No. 770, *supra*, at 12. Thus, Congress was aware of the type of remedies being afforded to judicial employees for employment discrimination through the EEO plan system, expressed its approval

of those remedies, and augmented them through revisions to the Back Pay Act of 1966.[4]

The CSRA, coupled with other congressional actions, including enactment of the AO Act and amendment of the Back Pay Act of 1966, accordingly manifests Congress's policy determination that Judicial Branch personnel, such as petitioner, who seek to challenge adverse personnel action are to do so through the Judicial Branch's administrative remedies. Compare *Bush*, 462 U.S. at 388-390. Although petitioner had no statutory review rights under the CSRA, he has meaningful remedies. The court of appeals correctly concluded that, "[i]n light of the comprehensive nature of the CSRA," petitioner "is precluded from asserting a *Bivens* claim in an attempt to recover damages for the constitutional violations alleged here." Pet. App. 11a.[5]

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[4] Congress demonstrated further deference to the Judicial Branch in the Congressional Accountability Act of 1995, in which Congress applied 11 federal employment and workplace laws to the Legislative Branch of the federal government. 2 U.S.C. 1301 *et seq.* (Supp. II 1996). Congress did not extend those laws to the Judicial Branch, but rather required the Judicial Conference to prepare a report for Congress, including "any recommendations the Judicial Conference may have for legislation to provide to employees of the judicial branch the rights, protections, and procedures under the listed laws." 2 U.S.C. 1434 (Supp. II 1996).

[5] The court of appeals correctly concluded that petitioner's reliance upon *Davis* v. *Passman*, 442 U.S. 228 (1979), is misplaced. In *Davis*, the Court permitted a former congressional staff member to bring a *Bivens* action against a congressman alleging unconstitutional discrimination on the basis of sex. The Court did not address the preclusive effect of the CSRA, which Congress had enacted only a few months before *Davis* was decided. Pet. App. 8a. Since that time, the Court has stated that its decision in *Davis* rested on the absence of *any* equitable or monetary remedy for the terminated staff member. See *Bush*, 462 U.S. at 376-377 & n.13. In this case, there is an elaborate administrative review scheme

2. Petitioner is also mistaken in contending that the courts of appeals' decision in this case gives rise to a conflict among the court of appeals warranting this Court's review. The court of appeals' decision is consistent with other circuit court decisions holding that the CSRA is a comprehensive statute that precludes *Bivens* claims even in those situations in which it does not provide review for a particular category of employee or claim. See *Saul* v. *United States*, 928 F.2d 829, 840 (9th Cir. 1991) (CSRA "precludes even those *Bivens* claims for which the act prescribes no alternative remedy"); *Lombardi* v. *Small Bus. Admin.*, 889 F.2d 959, 961 (10th Cir. 1989) (decisions in *Fausto* and *Schweiker* weigh against creating "a *Bivens* remedy in a Federal employment action even if no remedy at all has been provided by the CSRA"); *Feit* v. *Ward*, 886 F.2d 848, 855-856 (7th Cir. 1989) (withdrawing as contrary to *Schweiker* a plurality opinion allowing a discharged employee who had no remedy under the CSRA to bring a *Bivens* action).

Petitioner contends that the court of appeals' decision conflicts with *Duffy* v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997), cert. denied, 118 S. Ct. 1839 (1998). In that case,

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and the opportunity to obtain both equitable and monetary relief (back pay with interest). That important difference makes the reasoning of *Davis* inapplicable here. Indeed, Justice Marshall's concurring opinion in *Bush* explicitly endorsed the Back Pay Act of 1966 remedy as an adequate form of relief that forecloses a constitutional *Bivens* money damage action. See 462 U.S. at 390-391 (Marshall, J., concurring) ("Although petitioner may be correct that the administrative procedure created by Congress, unlike a *Bivens* action, does not permit recovery for loss due to emotional distress and mental anguish, Congress plainly intended to provide what it regarded as full compensatory relief when it enacted the Back Pay Act of 1966.") (footnote omitted).

the Eighth Circuit held that a court-adopted EEO Plan, standing alone, did not preclude a probation officer from asserting a *Bivens* sex discrimination claim against the judges who elected not to promote him to the position of Chief Probation Officer, *id.* at 1033, but ultimately affirmed the district court's grant of summary judgment in favor of the defendants, *id.* at 1040-1041. As the court of appeals in this case observed, it appears that "the defendants in *Duffy* never suggested that the CSRA preempted plaintiff's claim, but rather argued only that plaintiff's *Bivens* claim should have been dismissed because the local EEO Plan provided plaintiff with a remedy." Pet. App. 10a n.4. Because the Eighth Circuit did not address the CSRA's effect, *Duffy* does not conflict with the court of appeals' decision in this case. *Ibid.*

In addition, the Eighth Circuit appeared to rely on the defendants' failure to "present[] * * * support" for the conclusion that the remedial scheme available to judicial employees did not result from congressional inadvertence. *Duffy*, 123 F.3d at 1034-1035. As we explain above, there is ample indication that Congress deliberately limited the remedies available to judicial personnel for adverse personnel actions. The Eighth Circuit also appeared to believe that there were no statutory remedies available to Judicial Branch employees. *Ibid.* As discussed above, judicial employees may seek a remedy under the Back Pay Act of 1966 in conjunction with the Judicial Branch's administrative process for addressing discrimination complaints.

In any event, review of the issue presented here would be premature. At this juncture, only the Eighth and Eleventh Circuits have specifically addressed whether probation officers are entitled to a *Bivens* remedy for adverse personnel actions, and the Eighth

Circuit's consideration of the matter was based on incomplete arguments and incorrect assumptions. The Court would plainly benefit from further consideration of the issue in the courts of appeals. Currently, the issue is pending in at least one other court of appeals. See *DeMello* v. *Ney*, No. 97-15205 (9th Cir. (filed Nov. 5, 1998)); *Blankenship* v. *McDonald*, No. 97-35898 (9th Cir. (argued Dec. 10, 1998)). The question presented here does not warrant this Court's review at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

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KENNETH W. LEE,

Petitioner,

vs.

ROBERT C. HUGHES, JR. and
DANIEL C. LANFORD, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

1. Whether United States Probation Officers, as excepted service employees of the Judicial Branch, may bring *Bivens* actions for unconstitutional discrimination in their employment?

(The United States Court of Appeals for the Eleventh Circuit, in the case at bar, answered this Question in the negative, while the United States Court of Appeals for the Eighth Circuit has answered this Question in the affirmative.)

PETITIONER'S REPLY BRIEF

Pursuant to SUP. CT. 15.6, Petitioner hereby responds to matters asserted for the first time in the *Brief in Opposition*.

On pages 8-9, in the *Brief in Opposition*, Respondents, with reference to the district court EEO plan, state: "Under the Back Pay Act of 1966, a court employee who successfully invokes that administrative remedy may be entitled to back pay plus interest." The Respondents in the court of appeals below, represented there also by the Department of Justice, stated more precisely:

> In the event that an employee's complaint is sustained by the Chief Judge, the Chief Judge could reinstate an improperly terminated probation officer, pursuant to 18 U.S.C. § 3602(a). Moreover, if the employee incurred any lost pay, the employee would be entitled to back pay, with interest, pursuant to the Back Pay Act, as amended in 1990. In the Back Pay Act, Congress provided that if a covered federal employee is found "by appropriate authority under applicable law, rule [or] regulation" to have been "affected by an unjustified or unwarranted personal action" resulting in a loss of pay, the employee is entitled, "on correction of the personnel action," to the lost pay with interest. *See* U.S.C. § 5596(b)(1)(A)(i), (b)(2)(A).
>
> As the district court recognized, a Back Pay Act remedy would be available to a party prevailing in the administrative grievance process available to Plaintiff here. *See* R-25 at 3.

Supp. Pet. App. 15a. *See also* Pet. App. 16a. As Respondents are aware, pursuant to their joint presentation with Petitioner to the court of appeals below, Petitioner was not fired, and thus did not lose pay, *until* the Chief Judge approved the Magistrate's proposed finding and denied the Petitioner's remedy under the EEO plan. Supp. Pet. App. 17a-18a, 20a.

Accordingly, under the Respondents' position in this litigation, Petitioner has no remedy under the Back Pay Act, because he lost no pay prior to the final administrative decision, and he did not prevail on the administrative level. *See also United States v. Fausto*, 484 U.S. 439, 454 (1988). The Back Pay Act is only a limited waiver of sovereign immunity in order to allow a claimant to recover back pay that he should have been awarded as a result of prevailing on the administrative level. The Back Pay Act creates no substantive cause of action for an aggrieved Judicial Branch employee who lost on the administrative level. *Cf. United States v. Smith*, 499 U.S. 160, 174-175 (1991)(Gonzales Act does not create medical malpractice cause of action, but is only a waiver of sovereign immunity).

Petitioner notes that Congress has not closed the precise "hole" in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(a)[and as continued in the Civil Service Reform Act ("CSRA")], which "hole" this Court found determinative in *Davis v. Passman*, 442 U.S. 228 (1979). This Court's seminal decision in *Bush v. Lucas*, 462 U.S. 367 (1983), on the impact of CSRA on constitutional damage claims, expressly distinguished the case of persons such as Ms. Davis and others (to include this Petitioner) who have no statutory remedy at all for claims of unconstitutional discrimination, in both the main opinion, *id.*, at 378 & n. 14, and the concurring opinion, *id.*, at 390-391.

Petitioner would also like to respond to an area raised for the first time in the *Brief in Opposition*, at 10, wherein Respondents argue: "Congress described the AO Act as establishing a 'comprehensive personnel system' for Administrative Office employees, H.R. Rep. No. 770," and in their preceding paragraph on the same page: "Petitioner is not an employee of the Administrative Office and therefore is not entitled to invoke the specific administrative remedies that the Administrative Office created through that Act." Yet on page 11 of the *Brief in*

Opposition, the Respondents argue: "The CSRA, coupled with other congressional actions, including enactment of the AO Act and amendment to the Back Pay Act of 1966, accordingly manifests Congress's policy determination that Judicial Branch personnel, such as petitioner, who seek to challenge adverse personnel action are to do so through the Judicial Branch's administrative remedies."

First, a House Report that deals with AO employees is not an expression of the entire Congress's intent on any remedy for employees outside the AO. *Cf. Pierce v. Underwood*, 487 U.S. 552, 566-568 (1988).

Second, the *Study of Judicial Branch Coverage Pursuant to the Congressional Accountability Act of 1995* responded to Congress with the opinion that the district court EEO plan and the Back Pay Act were sufficient, *id.*, at 6, and the opinion that none of the enumerated eleven (11) labor-employment statutes, including Title VII of the Civil Rights Act of 1964, needed to be extended to Judicial Branch employees. *Id.*, at 16-19. It is too expansive for Respondents to argue this demonstrates Congress's specific legislative intent for *no* race discrimination claim to be raised by a non-AO judicial employee in a *Bivens* action. Moreover, the *Study* presupposes that a hearing will be provided to a complainant under the district court EEO plan. *Id.*, at 6. Yet in the case at bar, it is undisputed that Petitioner did not receive such a hearing. Pet. App. 3a. Instead, the chief district judge specifically declared that there would be no evidence, witnesses, or other evidentiary hearing. Supp. Pet. App. 19a.

Moreover, both of the Respondents' foregoing issues are made while repeating the phrase "adverse personnel action," as though this phrase dispositively and correctly described the claim brought by Petitioner. This phrase obscures the very essence of the claim that Petitioner was discriminated against on the basis of his race. Current and former employees of the U.S. Probation Office for the Middle District of Georgia were disclosed in the mandatory interrogatory answers required to be filed with the

Complaint, parallel to FED.R.CIV.P. 26(a)(1)(A), that Respondent Hughes had made a statement referring to Petitioner that they perceived [and which a jury could find] as racist in his explanation for Petitioner's discharge; that a number of Assistant U.S. Attorneys in the criminal division of the U.S. Attorney's Office for the Middle District of Georgia, including the Chief of the division, were prepared to testify on Petitioner's behalf and how surprised they were about his discharge; that the other (white) probation officers listed were prepared to testify that they did not receive annual performance appraisals subsequent to their initial probationary period, in contrast to the performance appraisals of a derogatory nature submitted against Petitioner by Respondents, in violation of applicable regulation and regular procedures; that Petitioner was denied necessary training in new procedures, unlike white probation officers; that Petitioner was denied new equipment and office furniture for so long, unlike white probation officers, that it became an office joke; that the other probation officers considered Petitioner a good and experienced worker and mentor, pleasant to be around, and that they were shocked by his firing; that a member of the criminal defense bar was prepared to testify as to Petitioner's good work and how he was surprised by the termination; that another U.S. magistrate judge before whom Petitioner regularly worked as a probation officer was prepared to testify that Petitioner's work was both good and the same as the other (white) probation officers in the district, and that the magistrate judge had directly told Respondents so. Supp. Pet. App. 1a-3a, 4a-13a.

Race discrimination, in any form, has long been unconstitutional under this Court's precedents. Indeed, race relations have had constitutional magnitude or import since the very adoption of the Constitution, in which the Constitution provided for allocation of representatives in the United States House of Representatives using a modified counting system to account for the

African slaves. U.S. CONST., ART. I, §§ 2, 9; ART. 4, § 2. After the Civil War, the Congress expressly took race into account in proposing the Thirteenth and Fourteenth Amendments, which the several States ratified. U.S. CONST., AMEND. XIII & XIV. This Court is still extremely sensitive about the role of race in all aspects of our constitutional form of government, e.g., reapportionment. *Cf. Miller v. Johnson*, 515 U.S. 900, 920 (1995) (strict scrutiny applied to race-based redistricting). These concerns are patently absent from the issues presented and ruled on in *United States v. Fausto*.

This brings us back to this Court's ruling in *Bush v. Lucas*, in which the majority opinion noted that the decision in that case would be different if there was no other statutory remedy for a constitutional wrong, 462 U.S., at 378 & n. 14, and in which the concurring opinion by Justice Marshall noted the role of the Back Pay Act. 462 U.S., at 390-391. As shown above, Petitioner has no Back Pay Act remedy. He has no statutory remedy at all.

Hence, the Eighth Circuit's focus on the district court EEO plan in *Duffy v. Wolle* and the Eleventh Circuit's focus on CSRA in this case are two permutations of the same prong from *Carlson v. Green*, 446 U.S. 14, 19 (1980), i.e., the lack of an adequate alternative statutory remedy. The Circuits are indeed "split."

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MYLES E. EASTWOOD
Georgia Bar No. 237700

Counsel of Record for
Petitioner Kenneth W. Lee

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SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

KENNETH W. LEE, Plaintiff, V. ROBERT C. HUGHES, JR. and DANIEL C. LANFORD, JR., Defendant.	)	CIVIL ACTION NO. 5:96-CV-316-3

COMPLAINT

* * *

78.

Subsequent to Plaintiff having been removed physically from his office due to his termination, Defendant Hughes in February 1996 stated to another employee in the U.S. Probation Office that Defendants Lanford and Hughes had tried everything with Plaintiff but it just didn't work out, that they had tried Plaintiff in supervision but he couldn't do that, that they had tried Plaintiff on PSI's but he couldn't do that, and that they had tried Plaintiff in Pre-trial Services and he could not do that either. Defendant Hughes then disclosed his discriminatory animus when he stated, "It must be a cultural thing."

79.

Plaintiff included the aforesaid discriminatory statement by Defendant Hughes in his allegations that were reviewed by Judge Hodge. In his subsequent report, Judge Hodge recites that Defendant Hughes did not recall making any such statement, but that if he did, it would have been in the context of Plaintiff's academic deficiencies. However, as shown in paragraphs 8 and 9 hereinabove, Plaintiff had received a Bachelors and Masters degree from predominantly minority (black) accredited institutions of higher learning, said criticism being again racist in nature and again disclosing Defendant Hughes' discriminatory animus on the basis of race and color.

80.

Defendants Lanford and Hughes unfairly and inaccurately characterized the person to whom Defendant Hughes had made such statement as a disgruntled employee when other persons in the Probation Office found that person to be a good worker whose only unhappiness was over the mistreatment being visited upon Plaintiff. These matters were also withheld from Judge Hodge by Defendants.

81.

Because of the material misrepresentations and half-truths taken out of context by Defendants in the course of an informal procedure where Defendants knew that Plaintiff would have neither the opportunity to review

the evidence they provided against him nor the opportunity to rebut same, Defendants materially misled U.S. Magistrate Judge Hodge, which misrepresentations of material fact and omissions of material fact led Judge Hodge to report, as they expected, that Judge Hodge recommended a ruling against Plaintiff.

82.

Chief U.S. District Judge Duross Fitzpatrick, solely in reliance upon the report and recommendation by Judge Hodge, after the informal investigation which was tainted by the material misrepresentations and omissions by Defendants, which misrepresentations were unknown as such to both Judge Fitzpatrick and Judge Hodge, approved the termination of Plaintiff from his employment as U.S. Probation Officer.

83.

Chief Judge Fitzpatrick notified Plaintiff by letter dated May 20, 1996, that he had approved the termination.

84.

Similarly situated white U.S. Probation Officers have not been terminated for the same alleged performance of duties as was Plaintiff.

* * *

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KENNETH W. LEE,

Plaintiff

V.

ROBERT C. HUGHES, JR.
and
DANIEL C. LANFORD,
JR.,

Defendant

CIVIL ACTION NO.
5:96-CV-316-3

PLAINTIFF'S ANSWERS TO MANDATORY INTERROGATORIES

* * *

4.

Identify by full name, address, and telephone number all witnesses whom Plaintiff will or may have present at trial . . . (Attach witness list to Answers to Mandatory Interrogatories as Attachment "A").

* * *

Attachment "A"

Beth Thomas, U.S. Probation Office, . . . Macon, Georgia [address deleted] . . . , is a U.S. Probation Officer who principally does pre-sentence investigation (PSI) reports.

She will testify that Plaintiff was a good worker, conscientious, hard-working, worked late, came early,

and was knowledgeable. She went to him to ask how to do various things or what to do on various items, because of his experience and knowledge about the work done at the Probation Office. She never observed any disrespectful or inappropriate conduct by Plaintiff. She was surprised when Plaintiff was fired. Ms. Thomas will also testify regarding the relevant circumstances concerning the *Andy Tham* case. This was a person who was arrested for arson. . . . Ms. Thomas assisted Plaintiff as Plaintiff came up with a "life" estimate by cross-referencing to murder because a death had occurred in the course of the alleged arson. . . . She specifically recalls Defendant Hughes coming into her office and asking her to: "Explain it to me again" while he leaned on the doorway of her office. He had misread the case that had been cited to him, and she perceived that he was trying to prove Plaintiff wrong, not Ms. Thomas.

Ellen Moore, . . . Macon, Georgia [address deleted] . . . , is a U.S. Probation Officer who is currently a guideline specialist. Ms. Moore will testify that Plaintiff, in his job performance, was professional, cordial, knowledgeable, and that she was surprised when Plaintiff was terminated. She will further testify that she had not heard any negatives about Plaintiff while they both worked at the U.S. Probation Office.

Barry Stapleton, . . . Macon, Georgia [address deleted] . . . , will testify to the same effect as the other U.S. Probation Officers, that Defendant Hughes was constantly micro-managing the office. . . .

Mr. Stapleton will further testify that in June 1993, he was sent to Savannah for a seminar . . . related to pre-trial

services. . . . Mr. Stapleton wondered why Plaintiff was not there but Mr. Stapleton was. The Probation Service had just gone to a new report format and the seminar would have been extremely useful to a Probation Officer such as Plaintiff who worked, at that time, in pre-trial services. . . .

Mr. Stapleton will also testify that he, like other U.S. Probation Officers, excluding Plaintiff, got new furniture and curtains. He will testify that there was an office joke about Plaintiff not getting new furniture. . . .

Mr. Stapleton will also testify that he does not receive annual written performance appraisals, that he might have received one, and that it has been a period of years since he has received one.

Donny Allen, . . . Macon, Georgia [address deleted] . . . , is a U.S. Probation Officer. He started working in the Probation Office in 1992. He will testify that he received one written performance appraisal at the end of his one-year probationary period and has not received any written performance appraisals since then.

* * *

Mr. Allen will testify that Plaintiff worked long hours, was helpful to others, was courteous, has a good sense of humor, and that Mr. Allen looked up to Plaintiff and asked him how to do things in and around the office because of Plaintiff's obvious experience and knowledge. . . . He will testify that he has observed no negatives with regard to Plaintiff's job performance or knowledge.

* * *

Don Milleman, U.S. Probation Office, . . . Macon, Georgia [address deleted] . . . , is a U.S. Probation Officer who has been employed in the office since 1976 and worked with Plaintiff from 1983 until Plaintiff's termination in 1996. Mr. Milleman will testify that he was surprised, like everyone else in the office, when Plaintiff was terminated. Mr. Milleman will testify that Plaintiff did not waste time, was always doing something, was industrious and loyal, that he would trust Plaintiff's judgement and job knowledge, that Plaintiff was courteous and had no personal problems. Mr. Milleman found Plaintiff to be professional in stressful situations and made no public displays of temper or irritation.

* * *

Mr. Milleman will testify that in his 19 years of employment in the U.S. Probation Office in Macon, he cannot recall the last time he received a written performance appraisal. It has definitely been a number of years ago.

Betty Tapley, . . . Macon, Georgia [address deleted] . . . , is currently employed . . . [at] . . . Wesleyan College, Macon, Georgia. She was Plaintiff's secretary from October 1991 through February 13, 1996, having succeeded Rose Miller as Plaintiff's secretary.

* * *

. . . Defendant Hughes shortly thereafter explained to her why Plaintiff had been terminated. Defendant Hughes stated: "We gave him PSI and he couldn't do that. We gave him supervision and he couldn't do that.

We gave him bail and he couldn't do that. It must just be a cultural thing." Ms. Tapley was shocked at this discriminatory statement. She told this statement to Juanita Hawley and another woman at lunch that same day, and Ms. Tapley cried when she told them about it. This was essentially the last straw for Ms. Tapley and she voluntarily tendered her resignation because she could no longer work in such a place. At her exit interview, she told Mary Ann Edge and Rose Miller what Defendant Hughes had stated, and Ms. Edge had tears in her eyes.

Ms. Tapley did not consider herself a disgruntled employee, enjoyed working with Plaintiff, worked hard, but was not happy about the way Plaintiff had been mistreated in the office.

Rose Miller, . . . Macon, Georgia [address deleted] . . . , was Plaintiff's secretary for the first seven years that Plaintiff worked in the U.S. Probation Office. After being Plaintiff's secretary, known as a Clerk, Ms. Miller became the Chief Clerk. She now serves as personnel specialist, JS-11, for the last two years.

. . . Ms. Miller works, in the performance appraisal area, with the clerical staff's performance appraisals and was surprised to learn, subsequent to Plaintiff's termination, that a number of white U.S. Probation Officers have stated that they do not regularly receive written performance appraisals and had not received performance appraisals for a number of years. She is expected to testify that § 4.04 makes no exception for Probation Officers as contrasted with other employees of the Probation Service and that if there was such an exception, the

regulation would be written differently to account for Probation Officers as contrasted with clerical employees.

* * *

With regard to Ms. Betty Tapley, Ms. Miller will testify that Ms. Tapley was a very good employee. . . .

Ms. Miller will testify that Betty Tapley told her that Defendant Hughes said that because of cultural things, Plaintiff could not grasp certain things. To Ms. Miller, as an African American, this was a racist statement, and she was surprised when she heard this. . . .

With regard to the office furniture, Ms. Miller will testify that the only new equipment or furniture received in his thirteen years of employment was a desk calculator, and that it took four years for him to get it after he asked for it. Numerous other employees got new furniture while Plaintiff did not.

Claude W. Hicks, U.S. Magistrate Judge, . . . Macon, Georgia [address deleted] . . . , will testify that during the thirteen years while he has been first a part-time and then a full-time U.S. Magistrate Judge, he found the work done by Plaintiff performed on cases assigned to Judge Hicks to always be accurate, timely, complete and good work. . . . The point, according to Judge Hicks, is that if there were any deficiencies in Plaintiff's work, they were no different than those he saw in any other Probation Officer's work. . . .

* * *

Judge Hicks is expected to testify that over the years he has on occasion gone to lunch with either Defendant Lanford or Defendant Hughes and that they would ask

him about Plaintiff's work. Judge Hicks always told them that Plaintiff's work was good and that he had no problem with Plaintiff's work. . . .

Charles Calhoun, Chief of Criminal Division, U.S. Attorneys Office, . . . Macon, Georgia [address deleted] . . . , will testify that he is Chief of the Criminal Division, U.S. Attorney's Office, Middle District of Georgia. He has worked with Plaintiff for a number of years on cases prosecuted by Mr. Calhoun where Plaintiff was the assigned U.S. Probation Officer. On both bail reports and PSI's, Mr. Calhoun will testify that when he provided information to Plaintiff, and then Mr. Calhoun received the reports submitted to the Judge assigned to the case, the information provided by Mr. Calhoun had been fairly and accurately set out in the report by Plaintiff. He will further testify that Plaintiff requested the appropriate and pertinent information that Mr. Calhoun, as Prosecutor, wanted communicated to the Court. . . . He will testify that as Chief of the Criminal Division, he heard no reports of any problems by Assistant U.S. Attorneys with Plaintiff and heard no negatives in any regard about Plaintiff in the performance of his duties as a Probation Officer or in his relationships with the U.S. Attorneys Office. Mr. Calhoun will testify that he was surprised, like the other prosecutors in his office, to learn that Plaintiff had been terminated by the U.S. Probation Office earlier this year.

* * *

Randall D. Russell, Faulkner & Russell, . . . Macon, Georgia [address deleted] . . . , is a lawyer in private practice in Macon, Georgia. Mr. Russell includes in his

practice the defense of criminal cases in the U.S. District Court for the Middle District of Georgia. Over the years, he has had numerous opportunities to work with Plaintiff on cases where Plaintiff was assigned as the Probation Officer working on the case of Mr. Russell's client. Mr. Russell found that, from a defense lawyer's viewpoint, Plaintiff always included the information provided by Mr. Russell in an accurate and fair manner in the reports submitted by Plaintiff to the judge assigned to the case. Mr. Russell is also expected to testify that Plaintiff asked Mr. Russell for the appropriate and pertinent information that Mr. Russell, as a criminal defense lawyer, would want presented to the judge assigned to his client's case. Mr. Russell found Plaintiff to be knowledgeable and easy to work with. Mr. Russell was shocked and surprised to learn that Plaintiff had been terminated from his position as a U.S. Probation Officer earlier this year.

Richard L. Hodge, U.S. Magistrate Judge, . . . Albany, Georgia [address deleted] . . . , was assigned to conduct an informal inquiry into the circumstances of Plaintiff's termination. He is expected to testify that he did not hold hearings but instead conducted informal interviews of Plaintiff, various persons named by Plaintiff as witnesses, Defendants Lanford and Hughes, and reviewed a number of documents, including those provided by Defendants Lanford and Hughes. . . .

It is expected that Judge Hodge will testify that he was not informed of the information listed above showing disparate treatment in written performance appraisals or the matters listed above rebutting various matters in Defendant Lanford's written presentation.

Duross Fitzpatrick, Chief U.S. District Judge, . . . Macon, Georgia [address deleted] . . . , is expected to testify that he made his decision to approve Defendant Lanford's proposed firing of Plaintiff based solely upon the report that Judge Hodge provided to him concerning Plaintiff's allegation of discrimination. As Chief U.S. District Judge, Chief Judge Fitzpatrick is the chief administrative officer of the District Court and his approval was required in order to implement the termination proposed by Defendants Hughes and Lanford.

Kenneth W. Lee, . . . Macon, Georgia [address deleted] . . . , is the Plaintiff in this case.

* * *

. . . [O]nly Plaintiff was issued adverse performance appraisals, marked down in his performance appraisals and otherwise written up as a result of such criticisms. Mr. Lee will testify that subsequent to his termination, he has learned from a number of white Probation Officers that they have not received regular annual written performance appraisals, and that a number of them cannot recall the last time they received one, or only received one after their probationary period and none since then. . . . Again, even though they received these same types of inconsistent and arbitrary instructions and were directed to rewrite reports for such reasons, none of the white U.S. Probation Officers were written up or otherwise marked down on their performance appraisals by Defendants.

Mr. Lee will testify that in 1993 he was working in pre-trial services and was no longer a generalist. A training session was scheduled by the Administrative Office

of the U.S. Courts to be held in Savannah, Georgia, concerning Critical Writing. The Probation Service had changed a number of its forms nationally including those involving bail reports and other reports that were to be frequently used in pre-trial service units. Although Mr. Lee had been scheduled to attend the seminar, he will testify that the Defendants canceled his attendance. They never gave him a satisfactory reason why he did not go.

* * *

Mr. Lee also requested after his termination that he be provided with a copy of his official personnel folder because Defendant Lanford's written response and U.S. Magistrate Judge Hodge's report reflect an assertion that Defendant Hughes and Lanford had been documenting Mr. Lee's alleged deficiencies in writing and placing them in his official personnel file. . . . Thus, Defendant Lanford has admitted to Mr. Lee that, contrary to the written statement to Judge Hodge by Defendant Lanford, the written criticisms were not routinely filed in the official personnel folder of Mr. Lee, raising a reasonable inference that Defendant Lanford did not follow regular procedures and also is not reliable on the other information provided to Judge Hodge. . . .

SUPPLEMENTAL APPENDIX C

No. 97-8423

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KENNETH W. LEE,
Plaintiff-Appellant,

v.

ROBERT C. HUGHES, JR., and
DANIEL C. LANFORD, JR.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

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* * *

In the event that an employee's complaint is sustained by the Chief Judge, the Chief Judge could reinstate an improperly terminated probation officer pursuant to 18 U.S.C. § 3602(a). Moreover, if the employee incurred any lost pay, the employee would be entitled to back pay, with interest, pursuant to the Back Pay Act, as amended in 1990. In the Back Pay Act, Congress provided that, if a covered federal employee is found "by appropriate authority under applicable law, rule, [or] regulation" to have been "affected by an unjustified or unwarranted personnel action" resulting in a loss of pay, the employee is entitled, "on correction of the personnel action," to the lost pay with interest. *See* 5 U.S.C. § 5596(b)(1)(i), (b)(2)(A).

As the district court recognized, a Back Pay Act remedy would be available to a party prevailing in the administrative grievance process available to plaintiff here. *See* R-25 at 3.

* * *

SUPPLEMENTAL APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal No. 97-8423

KENNETH W. LEE,
Plaintiff-Appellant

v.

ROBERT C. HUGHES, JR., and
DANIEL C. LANFORD, JR.,
Defendants-Appellees

On Appeal from the United States District Court
for the Middle District of Georgia, Macon Division

JOINT SUBMISSION OF ADDITIONAL MATERIALS
PURSUANT TO COURT'S DIRECTION

(Received Apr. 16, 1998)

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* * *

[Tab S-3]

WOLFE & STEEL, P.C.

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Of Counsel TODD K. MAZIAR

VIA FACSIMILE (912) 752-3502

April 1, 1996

THE HONORABLE DUROSS FITZPATRICK
United States District Court
Middle District of Georgia
Macon Division
Post Office Box 1014
Macon, Georgia 31202

Re: Kenneth W. Lee

Dear Judge Fitzpatrick:

I am writing you pursuant to the pending dismissal of my above-referenced client. I have been in touch with The Honorable Richard L. Hodge, whom you appointed as the Equal Employment Opportunity Coordinator in this case. It is Judge Hodge's understanding that Ken would remain on administrative leave *with pay* until the resolution of the objections to his dismissal and the Equal Employment Opportunity Complaint are concluded. He said for me to check with you, and I am simply contacting your office to be certain that his understanding is correct.

Please contact me immediately if Mr. Lee is not to remain on administrative leave with pay. Thank you for your kind attention in this matter.

I am,

Sincerely,

/s/ L. D. Wolfe
L. David Wolfe, P.C.

LDW:adm

[Tab S-6]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

IN THE MATTER OF: KENNETH LEE
U. S. PROBATION OFFICER

CONFERENCE

IN MACON, GEORGIA MAY 15, 1996

HONORABLE DUROSS FITZPATRICK,
U.S. District Judge, Presiding

APPEARANCES:

For Mr. Lee: MR. DAVID WOLFE
Attorney at Law
Suite 300
Peachtree Palisades West
1800 Peachtree St., N.W.
Atlanta, Georgia 30309

For U.S. Probation Dept.:

MR. DAN LANFORD and
MR. ROBIN HUGHES
433 Walnut Street
Macon, Georgia 31201

* * *

THE COURT: And there's no set procedure. I mean, it's not a hearing, there's no rules of evidence, no witnesses to be called, the way I see it. The way I see it is I just listen to you and to Mr. Lee, if he was here, and based on that, decide whether or not to approve of this action.

MR. WOLFE: May I say a couple of things?

THE COURT: Oh, yeah. I mean, as far as I'm concerned, there's no particular rules in effect here. This is basically a discussion around the table.

* * *

[Tab S-8]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
475 MULBERRY STREET
POST OFFICE BOX 1014
MACON, GEORGIA 31202

CHAMBERS OF
DUROSS FITZPATRICK
CHIEF JUDGE

AREA CODE 912
TEL: 752-3500
FAX: 752-3502

May 20, 1996

VIA FACSIMILE

Mr. L. David Wolfe
Wolfe & Steel, P.C.
Suite 300, Peachtree Palisades West
1800 Peachtree Street, N.W.
Atlanta, GA 30309

RE: Kenneth W. Lee
United States Probation Officer
Termination of Employment

Dear Mr. Wolfe:

After much consideration I can find no reason to overrule Mr. Lanford's decision terminating your client. Therefore, it appears that his termination is final.

Sincerely,

/s/ Duross Fitzpatrick
Duross Fitzpatrick

DF/bb

c: Mr. Dan Lanford